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Opinion Committee



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August 4, 1997

VIA FEDERAL EXPRESS

The Honorable Dan Morales
Office of the Attorney General
Opinion Committee
300 West 15th Street
Austin, Texas 78711

RQ-954

Re: Request For Opinion Regarding Continuing Effect of Section 218 Agreement

To the Honorable Attorney General:

Pursuant to section 402.042 of the Texas Government Code, I write to request an opinion from your office that finds that the newly created North Texas Tollway Authority, a political subdivision of the State of Texas, is bound by the Section 218 Agreement that its predecessor, the Texas Turnpike Authority, an agency of the State of Texas, executed with the Employees Retirement System of the State of Texas.

As you may be aware, the Governor signed the Regional Tollway Authority Act, S.B. No. 370, 75th Leg. (Tex. 1996), into law on June 20, 1997. Under the provisions of this legislation, which is effective as of September 1, 1997, the Texas Turnpike Authority ("TTA") will be abolished, and the North Texas Tollway Authority ("NTTA") will be established under Chapter 366 of the Texas Transportation Code. Substantially all of TTA's assets and employees will be transferred to the NTTA as of the effective date of the legislation. The language in S.B. No. 370 describing this conversion states that "the North Texas Tollway Authority is a successor agency to the Texas Turnpike Authority for all purposes", and that the NTTA "shall succeed to all assets, rights, and other property of the Texas Turnpike Authority [situated in the four counties in which the TTA currently operates projects]," including "all existing and proposed extensions to projects, the TTA administration building, and all other facilities, improvements, leaseholds, funds, accounts, and investments." S.B. No. 370, sections 8.03 and 8.01(b) (a copy of the applicable portions of Article 8 of SB No. 370 are enclosed).

Mr. Dan Morales
August 4, 1997
Page 2

The TTA previously entered into a voluntary Section 218 Agreement to extend full Social Security benefits to its employees, supplementing the retirement benefits provided under the qualified retirement plan of the Employees Retirement System of the State of Texas. By way of background, under the Social Security Act, 42 U.S.C. § 301 *et seq.*, state and local governments can enter into voluntary agreements, which are known as "Section 218" agreements, to provide social security coverage to their employees by paying required taxes under the Federal Insurance Contributions Act ("FICA").¹ After April 19, 1983, agreements extending social security coverage to state and local employees may not be terminated with respect to any coverage group by either the state or local government or the Social Security Administration. 42 U.S.C. § 418(g).

The State of Texas has authorized the Employees Retirement System of the State of Texas to enter into Section 218 agreements on behalf of the state and political subdivisions with the delegate of the United States Secretary of Health and Human Services. TEX. GOV'T CODE ANN. § 606.003 (Vernon 1994). A political subdivision, as defined by the Texas Government Code, includes "a county, municipality, or an instrumentality of the state, or another political subdivision that is a juristic entity that is legally separate and distinct from the state or political subdivision and whose employees are not employees of the state or political subdivision." *Id.* at § 606.001. A political subdivision that is eligible under the Social Security Act also may enter into an agreement to obtain coverage for its employees under Social Security through the Employees Retirement System of the State of Texas. *Id.* at § 606.022.

Because the TTA is a public employer that entered into a Section 218 Agreement after April 19, 1983, it must continue Social Security unless it ceases to exist. It is our opinion that the Section 218 Agreement continues to be binding upon the NTTA and its employees because the NTTA is the successor to the TTA, and thus the TTA is not ceasing to exist for purposes of the Section 218 Agreement. The continued existence of the TTA, for purposes of the Section

¹ FICA taxes consist of the Old-Age, Survivor and Disability Insurance ("OASDI") taxes imposed under section 3101(a) and 3111(a) of the Internal Revenue Code, and the hospital insurance (Medicare) taxes imposed under Code sections 3101(b) and 3111(b). FICA taxes are computed as a percentage of the wages paid by the employer and received by the employee with respect to employment. In general, all payments from an employer to an employee for employment services performed by the employee are subject to FICA taxes, unless the payments are specifically excepted from the term "wages" or the services are specifically excepted from the term "employment". Section 3121(b)(7) of the Code excepts from the term "employment" those services that an employee performs while in the employ of a state, a political subdivision of a state, or an instrumentality that is wholly-owned by a state or political subdivision. However, this exception does not apply to, and thus FICA taxes must be paid for, service by the employees of a state or political subdivision if the governmental entity has entered into a voluntary "Section 218" agreement with the Secretary of Health and Human Services so as to elect social security coverage for groups of its employees. Code section 3121(b)(7)(E); *see also id.* at 3121(d)(4) (defining "employee" as "any individual who performs services that are included under an agreement entered into pursuant to section 218 of the Social Security Act.").

Mr. Dan Morales
August 4, 1997
Page 3

218 Agreement, can be supported by the provisions of Section 8.03 of the Regional Tollway Authority Act, which provides, in pertinent part:

The North Texas Tollway Authority is a successor agency to the Texas Turnpike Authority for all purposes Any existing agreement by and between the Texas Turnpike Authority and the state, the Texas Transportation Commission, the Texas Department of Transportation, the Federal Highway Administration, the United States Department of Transportation, any other federal or state governmental entity, or any local governmental entity that pertains to an asset, right, or obligation transferred to the North Texas Tollway Authority under this Act is binding on, benefits, and is fully enforceable by and against the North Texas Tollway Authority as successor to the Texas Turnpike Authority.

(emphasis added).

The NTTA is a political subdivision as defined in the Social Security Act and the Texas Government Code. 42 U.S.C. 418(b)(2) (1991) (defining a political subdivision as an instrumentality of a state, one or more political subdivisions of a state, or a state and one or more of its political subdivisions); TEX. GOV'T CODE ANN. § 606.001 (Vernon 1994). While NTTA is not an agency of the State of Texas, it is an instrumentality of the State eligible for Section 218 Agreement election. Therefore, in light of the NTTA being a successor agency and further being bound by any agreement with any state or federal agency previously entered into by the TTA, we do not believe that the change from the TTA to the NTTA should affect the application of the current Section 218 Agreement binding the TTA and its employees.

Moreover, the NTTA will be a successor entity for purposes of determining the maximum amount of compensation subject to the OASDI portion of the FICA tax. See note 1, supra, and Treas. Reg. § 31.3121(a)(1)-1(b)(2). The Treasury Regulation states that "a successor employer may consider wages paid by a predecessor during the calendar year in which the acquisition occurred and before the acquisition date for purposes of applying the annual wage limitation" if:

- the successor acquired substantially all the property used in the trade or business, or a separate unit of a trade or business, of a predecessor, during the calendar year; and

Mr. Dan Morales
August 4, 1997
Page 4

- the employee was employed in the acquired business immediately before and immediately after the acquisition.

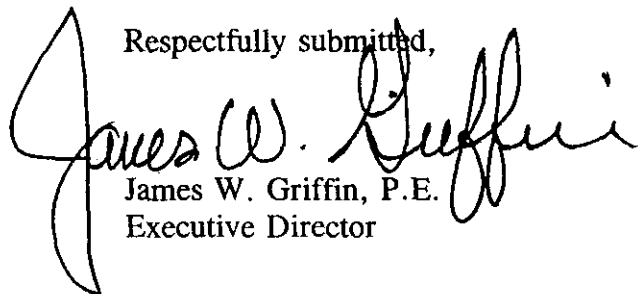
As we have previously indicated, the NTTA will acquire substantially all of the property of the TTA and substantially all of the employees of TTA will become employees of the NTTA. Therefore, the NTTA should be considered to be bound by the Section 218 Agreement that was entered into on behalf of the TTA.

In order for the NTTA to continue to participate in the social security program under the existing Section 218 Agreement, the Social Security Administration has indicated that the TTA/NTTA must obtain an opinion from your office finding that the NTTA is bound by the existing Section 218 Agreement that was entered into on behalf of the TTA. The Texas Turnpike Authority Board has asked me to convey its respectful request for a reply in this matter as soon as possible, as the NTTA will begin operations on September 1, 1997. The TTA, and its successor the NTTA, must determine whether the employees of the North Texas Tollway Authority are subject to the Section 218 Agreement between the TTA and the Employees Retirement System.

If you have any questions or concerns with respect to this request for an opinion, or if we can provide you with any additional information to assist you in your review of this important matter, please call E. Philip Bush, a shareholder at the law firm Locke Purnell Rain Harrell (A Professional Corporation), at (214) 740-8542. Mr. Bush represents the TTA and is assisting the TTA through this critical transition period.

Thank you for your consideration of this important matter.

Respectfully submitted,



James W. Griffin, P.E.
Executive Director

Enclosure

cc: Johnnie Morales, Sr.
State Social Security Administrator
Employees Retirement System of Texas